No. 21,971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY ALUMINUM, INC., APPELLANT,

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE,

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
CHARLES N. STEELE,
Attorneys,

National Labor Relations Board.

I N D E X

AUTHORITIES CITED

Cases:

Cases -- continued

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JURISDICTIONAL STATEMENT

This case is before the Court upon an appeal from an order of the District Court of the United States for the Central District of California granting the Board's application for enforcement of a subpena under Section 11(2) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq., hereafter referred to as the Act. The jurisdiction of the Court is invoked under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE

A. Proceedings before the Board

On April 19, 1965, the Union[1/] filed a charge with the National Labor Relations Board that Harvey Aluminum, Inc. ("the Company") had

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1/ United Steelworkers of America, AFL-CIO.

violated Section 8(a)(1) and (3) of the Act by eliminating or reducing overtime for employees and by discharging employees in order to discourage membership in the Union (R. 16-34).[2/] Thereafter, the Regional Director of the Board issued a complaint and notice of hearing and an amended complaint and notice of hearing under Section 10(b) of the Act, alleging that respondent had violated Section 8(a)(3) and (1) of the Act by reducing and eliminating overtime for its production and maintenance employees, by laying off employees, by threatening employees with reduction and elimination of overtime, and by informing employees that overtime had been reduced because the Union had won a Board conducted election and because employees supported the Union (R. 37-38, 40-43). The complaint and amended complaint were duly served upon the Company, which filed answers thereto (R. 44-48).

In order to obtain the records necessary to prove the allegations of the complaint, the Regional Director, pursuant to Section 11(1) of the Act, caused a subpena duces tecum to be issued and served upon the Company (R. 49-53). The subpena directed the Company to produce at the hearing payroll records showing: (1) weekly totals of hours worked between October 1964 and April 1965 by production and maintenance employees, the names of such employees and the departments in which they worked; (2) names of employees hired during December 1964 and January through March 1965 and

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2/ References to those portions of the Record printed in Volume 1, Transcript of Record are designated "R." References to the transcripts of the hearings in the District Court are designated "Tr."

the departments to which they were assigned; and (3) names of employees laid off in the foundry department of the extrusion division during January and February 1965 and the dates of any such layoffs. As an alternative, the subpena provided that the Company could produce a signed statement setting forth the requested information if it also made the appropriate records available for verification (R. 49).

Respondent filed a petition to revoke the subpena, on the grounds that the subpena requested irrelevant and immaterial information and put an unreasonable burden on respondent (R. 54). The Trial Examiner then modified the subpena to provide that Board agents would do the work of copying the information from the records, if respondent showed that the original subpena was burdensome (R. 69). The Company then filed an application for an interim appeal to the Board (R. 70-77) which was granted on October 17, 1966, with the Board sustaining the Trial Examiner's ruling and enforcing the subpena (R. 89). Respondent, however, still refused to comply with the subpena.

B. Proceedings before the District Court

On Thursday, October 20, 1966, the Board filed an application in the District Court under Section 11(2) of the Act for enforcement of its subpena (R. 9-90). Attached as exhibits thereto were copies of all the pleadings, motions, memoranda and rulings in the unfair labor practice proceeding dealing with the subpena, including the defenses raised by Harvey against compliance and the Trial Examiner's and Board's rulings thereon (R. 16-89). The application requested either an order, "issued forthwith," enforcing the subpena, or an order directing Harvey to appear before the

Court and show cause why an order should not issue enforcing the subpena (R. 14). The application was accompanied by a memorandum of points and authorities on the procedural and substantive issues raised by the application (R. 2-8). Copies of the application, exhibits and memorandum were served by mail that day upon counsel for Harvey (R. 142).

An order did not "issue forthwith" as prayed in the application. Rather, Chief Judge Thurmond Clarke set the case for hearing before himself on Monday, October 24, at 10 a.m. -- the next regular date and time when motions and orders to show cause are heard.[3/] Board counsel notified company counsel by telephone on October 20 of the date and time of the hearing on the application, and of the judge who would hear the case (R. 142).

At the hearing on the application, counsel for the Board, George Pappy, spoke first. He explained to the Court what material was subpenaed and why the Board needed it, and urged that the application and attached exhibits showed that all the elements necessary for an order enforcing the subpena were present (Tr. 3-8). Mr. Pappy argued that therefore, a "hearing on the merits" of the application was "unnecessary" (Tr. 7). Mr. Pappy also pointed out that there was precedent in that and other courts for treating the application as a "summary proceeding not requiring the issuance of process, hearing, findings of fact, or the elaborate process of a civil suit" (ibid.).

3/ Under Rule 3(b) of the Rules of the Central District of California, all motions and orders to show cause are heard on Mondays beginning at 10 a.m. Rule 3(j) states that applications for ex parte orders shall be heard first. The case at bar came on for hearing at 11 a.m. after the Court heard other matters (Tr. 3).

After Mr. Pappy had concluded, Chief Judge Clarke announced that he would "hear from the other side" and that he would "take the matter under submission" after that (Tr. 8-9). William F. Spalding, counsel for Harvey, then approached the bench and announced he was entering a "special appearance" on behalf of his client because, he claimed, the court had "no jurisdiction of this matter, none over the defendant personally" (Tr. 9).

Chief Judge Clarke observed that Mr. Spalding had filed no memorandum of points and authorities, and offered to give him 5 or 10 days to reply to the Board's memo. To this offer, Mr. Spalding replied (Tr. 10): "Well, my reply to it, sir, would solely be in the nature of a special appearance and I am willing to so appear. I think that counsel is totally mistaken." At the urging of Chief Judge Clarke, Mr. Spalding finally agreed to file a written response to the application after receiving assurances from the Court that submitting it would not constitute a waiver of his challenge to the Court's jurisdiction (ibid.). The Court gave Mr. Spalding 10 days to file his response, and then stated (Tr. 11):

> ". . . when that arrives I will mark it /i.e., the application/ submitted. I will have to rule on the matter, and if there is anything you want to state orally now in addition to what you are to state in written form, you can, Mr. Spalding."

In response to the Court's invitation to say "anything" with respect to the Board's application, Mr. Spalding said (Tr. 11-12):

> "I will only state that the plaintiff here is totally mistaken in his rights. He seems to assume

the Federal Rules of Civil Procedure have no application. He filed a document with the Clerk's Office under a Miscellaneous matter. There is no process asked for or issued. Rule 81 requires that the Federal Rules of Civil Procedure be followed on such an application as we have here. It means he has to file a complaint, he has to state grounds for relief, get summons out, wait to get it served and he has got to wait for an answer, and then and only then can a motion for an order to show cause or a summary judgment or what-have-you be made, but until they have served process there is nothing even before the court, and of course they are relying on an antiquated case in 1941, which has been overruled by statute.

This is essentially what my position will be and I will cite the rules and the theory sustaining them."

Mr. Spalding's memorandum rearticulated this position and stated that the Company would refuse to present any defense on the merits of the subpena "until brought within the Court's jurisdiction" (R. 106). After the Board filed a reply memorandum, the Court, on November 18, signed an order enforcing the subpena (R. 122-123). No notice of signing the order was given to the parties and the order was not entered until March 6, 1967 (ibid.). Notice of appeal was filed by the Company on April 20 (R. 131).

On May 1, the Board filed a motion to vacate the order and asked the District Court to indicate whether it would issue an order to show cause why the Board's subpena duces tecum should not be enforced, in order to clarify the record on appeal (R. 135). The Court, after a hearing on May 10, denied the motion on May 16, without opinion (R. 166).

ARGUMENT

THE DISTRICT COURT PROPERLY ENFORCED THE BOARD'S SUBPENA

A. The Company had notice of the subpena enforcement proceeding, and was afforded an opportunity to raise any defenses it wished to the granting of the Board's application

In its brief, appellant repeatedly describes the order of the District Court enforcing the Board's subpena as having been issued after an ex parte proceeding in which the Company had no opportunity to be heard on the merits of the Board's application. The Company errs in this description.

Black's Law Dictionary (4th ed., West Publ. Co., 1951), in defining the term "ex parte", states:

> "A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested."

The record in the instant case shows that there was both notice to, and contestation by, the party adversely interested in the proceeding. A copy

of the Board's application, exhibits and supporting memorandum was mailed to counsel for Harvey the day it was filed, October 20, 1966. That same day, counsel for Harvey was notified personally by counsel for the Board of the date, time and place of a hearing on the application. When the case came on for hearing four days later, counsel for both sides were present. The transcript of that hearing shows that counsel for the Company knew what the case was about, that he was given an opportunity to present his arguments to the Court orally, and that he was also given 10 days to present his defenses in writing.

Contrary to the Company's claim in its brief to this Court (pp. 2, 21), the hearing on October 24 was not limited to the question whether the Court could grant an ex parte order enforcing the Board's subpena. Counsel for the Board, Mr. Pappy, addressed his oral argument -- as he had addressed the memorandum filed in support of the application -- to both the merits of the application and the procedure used in seeking a court order (Tr. 3-8). The sum and substance of Mr. Pappy's argument was that, under established law, a proceeding to enforce a Board subpena did not require "the issuance of process, hearing, findings of fact, or the elaborate process of a civil suit" (Tr. 7), and that the "manifestly meritorious nature of the Board's case /as shown by the application, exhibits attached thereto and supporting memorandum/, in the absence of any substantial or cognizable issues of fact /in the subpena enforcement proceeding/, warrant summary enforcement of the subpena" (Tr. 8).[4/]

4/ In this connection, during the course of his argument, Mr. Pappy stated: "However, there is another issue in this case, and the reason we are here today. The question is, shall the principal

(footnote con't)

It is true that Company counsel, Mr. Spalding, limited his argument to the Court's alleged lack of jurisdiction over Harvey and the failure of the proceeding to comply with the Federal Rules because there had been

4/ (footnote con't)

case be delayed even further by what we consider would be an unnecessary hearing on the merits of this proceeding" (Tr. 7). At the later hearing on the Board's motion to clarify the record on appeal, counsel for Harvey construed the foregoing statement as posing the question whether the subpena could be enforced by ex parte order (Tr. 25-27). That interpretation is incorrect. Since the Company was in court and being heard, it was obviouly too late to argue over whether the order could issue ex parte. Rather, Mr. Pappy was saying only that the issue before the court was whether Harvey could raise any matter by way of defense which would warrant a hearing before the subpena could be enforced. It was his contention, of course, that the Company had no meritorious defenses against the relief sought, and that no further hearing was warranted.

no complaint filed, no service of process, and no opportunity for the Company to file a formal answer. In thus limiting its response, however, and by disregarding the merits of the Board's application, the Company waived the right to assert any other defenses if the Court ruled against it on the jurisdictional point. For Chief Judge Clarke had repeatedly advised the parties that he would take the case as submitted upon the conclusion of this hearing and the receipt of a memorandum from the Company and a reply thereto from the Board. See R. 91; Tr. 8-9, 11, 12. Twice during the course of the hearing, the Chief Judge invited the Company to "reply" to the Board's memorandum, and to state "anything . . . orally now in addition to what you are to state in written form" with regard to the application (Tr. 10, 11). Simply put, the Court was asking the Company to show cause why the subpena should not be enforced. Each time, however, counsel for the Company limited his response to a challenge to the jurisdiction of the Court despite an assurance from Chief Judge Clarke that the filing of a reply to the Board's memo would not constitute a waiver of the jurisdictional issue (Tr. 10, 11-12).

Not until it filed its memorandum on November 3, 1966 (R. 92-107), did the Company give any indication that it desired to assert any defenses on the merits of the Board's application for subpena enforcement. Even then, the defenses were not actually asserted, but merely alluded to. The Company described in ambiguous, conclusory terms to "positions" it "will" assert "if permitted to be heard, and upon being brought within the Court's

jurisdiction. . . ." (R. 106).[5/] The Company, however, had already been "permitted to be heard," but had raised no defense except that it had not been "brought within the Court's jurisdiction." Since, at the hearing, the District Court had invited Company counsel to say anything he wanted to because the case would be taken as submitted when the Company's memorandum and the Board's reply memorandum were filed, the Company cannot now be heard to complain because the Court decided the application on the basis of the record thus made. The Company was not precluded from raising any defenses to the merits of the Board's application; it simply wilfully failed to take advantage of the opportunities to do so.

5/ The defenses described in the Company's memorandum had been raised before the Trial Examiner and the Board when the Company had unsuccessfully moved to revoke the subpena, and were before the Court--along with counsel for the General Counsel's responses thereto--as exhibits to the Board's application. See R. 16-90. The application and attached exhibits contained the charge and all the pleadings in the unfair labor practice case, as well as the subpena and all the motions, appeals, memoranda and rulings in the administrative proceeding relating thereto. The relevance and materiality of the documents subpenaed, and the question whether the subpena was unduly burdensome, could thus be determined from the facts established by the Board's application itself.

B. The procedure followed by the District Court complied with the requirements of due process, and the order directing Harvey Aluminum to comply with the subpena is valid and should be affirmed

In the preceding section of this brief, we have shown that the Company was served with a copy of the Board's pleading, knew of the allegations against it, and was afforded an opportunity to answer those allegations and to be heard thereon. Harvey claims, however, that the procedure employed was improper under the Federal Rules of Civil Procedure, and that the order resulting therefrom was therefore void. The Company rests its argument on Rule 81(a)(3), F.R. Civ. P., which states, in relevant part:

> "These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."

It is the Company's contention that no deviation from the Federal Rules in a Board subpena enforcement proceeding is "otherwise provided by statute," and that the District Court never entered an order suspending the applicability of any of the rules.

We submit that appellant's arguments are without merit: the National Labor Relations Act does provide a special procedure for Board

subpena enforcement proceedings in the district courts; and in any event, the court below properly exercised its power under Rule 81(a)(3), F.R. Civ. P., to proceed differently than the Federal Rules require. Before discussing these issues, however, we believe it necessary to consider the context in which administrative subpena enforcement proceedings arise.

1. The need for summary subpena enforcement proceedings

The need for a summary proceeding for enforcement of administrative subpenas has long been recognized. "The importance of promptness as well as adequacy in administrative investigation (necessarily involving prompt and efficient use of the subpena power) both of statutory violations and of the general administration of legislation . . . is an indispensable condition of the effective enforcement of remedial social legislation. . . ." Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 216 (C.A. 2), aff'd 317 U.S. 501. To make effective the subpena powers given by Congress to the administrative agencies, the courts have consistently barred review at the subpena enforcement stage of issues litigable on appeal from the final agency order. Oklahoma Press v. Walling, 327 U.S. 186, 208-209; Endicott Johnson Corp. v. Perkins, supra, 317 U.S. at 508-509. In order not to preclude or unduly delay the agency from making a determination which was entrusted to it by Congress in the first instance, the courts will not require that the agency show that there exists probable cause to believe that the statute has been violated or that the coverage of the statute extends to the violation in question before enforcing the

subpena. Oklahoma Press, supra; Endicott Johnson, supra; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 49; F.T.C. v. Crafts, 355 U.S. 9, rev'g per curiam, 244 F. 2d 882 (C.A. 9); U.S. v. Morton Salt, 338 U.S. 632, 652; U.S. v. Powell, 379 U.S. 48, 57-58. See, also, C.A.B. v. Hermann, 353 U.S. 322, rev'g per curiam, 237 F. 2d 359 (C.A. 9). As stated by the Supreme Court, ". . . it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 'The gist of the protection is the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.' Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208." U.S. v. Morton Salt, supra, 338 U.S. at 652-653. See, also, Chapman v. Maren Elwood College, 225 F. 2d 230, 231 (C.A. 9); F.C.C. v. Schreiber, 329 F. 2d 517, 520 (C.A. 9), modified on other grounds, 382 U.S. 279.

These general rules are specifically applicable to Board proceedings. The "scope of permissible judicial inquiry in deciding whether such an application [for subpena enforcement] should be granted or denied . . . is extremely limited." N.L.R.B. v. C.C.C. Associates, Inc., 306 F. 2d 534, 538 (C.A. 2). Duly issued subpenas are entitled to enforcement subject only to the requirements that the Board is acting within its statutory authority in a general class of proceeding that it is empowered to conduct, that the subpenas are not unreasonably burdensome, and that the information sought is not plainly incompetent

or irrelevant to any lawful purpose.[6/] Given the limited nature of the issues litigable in a subpena enforcement proceeding, and given the fact that frequently the Board proceeding cannot be concluded until the information sought is obtained, the appropriateness of a summary proceeding to enforce a Board proceeding is readily apparent. As we now show, Section 11(2) of the Act provides for just such a summary procedure.

2. The Act provides a special procedure for Board subpena enforcement proceedings in the district courts

Section 11(2) of the National Labor Relations Act, under which this proceeding was instituted, provides:

> "In case of contumacy or refusal to obey a subpena issued to any person [by the Board], any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring

6/ See Hamilton v. N.L.R.B., 177 F. 2d 676, 677 (C.A. 9); N.L.R.B. v. C.C.C. Associates, 306 F. 2d 534, 538 (C.A. 2); N.L.R.B. v. Friedman, 352 F. 2d 545, 547 (C.A. 3); Link v. N.L.R.B., 330 F. 2d 437, 440 (C.A. 4); Cudahy Packing Co. v. N.L.R.B., 117 F. 2d 692, 694 (C.A. 10); N.L.R.B. v. United Aircraft, 200 F. Supp. 48, 50-51 (D. Conn.), aff'd per curiam, 300 F. 2d 442 (C.A. 2); N.L.R.B. v. Gunaca, 135 F. Supp. 790, 795-796 (E.D. Wisc.), aff'd, 230 F. 2d 542 (C.A. 7), vacated as moot, 353 U.S. 902.

such person to appear before the Board, its members, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question. . . ."

The leading case construing this provision of the Act is Goodyear Tire & Rubber Co. v. N.L.R.B., 122 F. 2d 450 (C.A. 6, 1941), affirming 36 F. Supp. 413 (D.C. Ohio, 1940). There, as here, the Board had initiated the proceeding by filing an application for subpena enforcement which alleged facts showing the circumstances in which the subpenas were issued, the relevance of the material subpenaed to the matter under investigation, and the circumstances surrounding the refusal of the persons subpenaed to comply. Pursuant to the prayer of the Board in its application, an order to show cause was issued immediately by the district court directing the respondents to answer the application and file whatever affidavits and briefs they desired within 6 days, and giving the Board 5 days more to reply. The order further provided that the application and order to show cause be served on each of the respondents, and that the case would be decided on the papers--with or without a hearing, at the discretion of the court--2 days after the Board had filed its reply. No summons was issued or served. Within the time allowed, the respondents--like appellant here--moved to dismiss or quash the proceeding because of lack of jurisdiction over the persons of the respondents in that there was insufficiency of service of process. In addition, respondents there also moved to dismiss for failure of the application to state a claim upon which relief could be granted, and they

filed an answer raising defenses on the merits of the application. 7/

The District Court decided the case on the papers and without a hearing. Rejecting the respondents' attack on the procedure followed, the Court enforced the Board's subpenas. On appeal by the respondents, the Sixth Circuit affirmed, stating (122 F. 2d at 451):

> ". . . We agree with the District Court that the proceedings plainly are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit. We think the procedure to be followed in the District Court is controlled by §11 (2) of the Act. . . .

7/ The foregoing facts are based upon the record filed with the Sixth Circuit in that case, and are set out in slightly less detail in the District Court's decision (36 F. Supp. 413). The procedure used in Goodyear is substantially the same as the procedure which the Board customarily uses today. In N.L.R.B. v. British Auto Parts, 266 F. Supp. 368 (C.D. Cal.), the Board used the procedure prescribed by the Federal Rules because the Board was asking for injunctive relief as an alternative to subpena enforcement. Admittedly, the procedure used in the case at bar deviated from the Board's usual practice in that no written order to show cause issued (although one was requested in the alternative), and service of the application and notice of the hearing was accomplished in a less formal manner. As we have already shown, however, these deviations did not prejudice the company in any way, for it did actually receive notice of the hearing and a copy of the application, and it was given ample time to file a written response--4 days before the hearing, and 10 days thereafter.

"It is significant that the statute calls for an 'application' rather than a petition, for an 'order' rather than for a judgment, and that it details no other procedural steps. Obviously, if the enforcement of valid subpoenas, the issuance of which is a mere incident in a case, were to require all of the formalities of a civil suit, the administrative work of the Board might often be subject to great delay. We think that such was not the intention of the Congress, and that this clearly was indicated by the use of the simple and unambiguous words with which it described this proceeding."

See, also, Cudahy Packing Co. v. N.L.R.B., 117 F. 2d 692, 694 (C.A. 10), affirming 34 F. Supp. 53, 60 (D.C. Kans.).

When Congress was considering the Taft-Hartley amendments of 1947, it was presumptively aware of Goodyear and Cudahy Packing, and of the procedures used by the Board and the courts in subpena enforcement proceedings. By reenacting Section 11(2) without change, Congress gave strong evidence of its approval of these procedures, and of the judicial construction placed upon that section of the Act. Shapiro v. United States, 335 U.S. 1, 16. See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 58 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 58 (1947). Accordingly, Section 11(2) must be read as providing a summary procedure apart from the Federal Rules for securing enforcement of Board subpenas in the district courts. The procedure used in the case at bar complied with the procedure contemplated by Section 11(2), and the

Constitutional requirement of due process was satisfied. The proceeding was therefore proper and is immune from attack as an unwarranted departure from Rule 81(a)(3).[8/]

8/ The foregoing conclusion is confirmed by Kennedy v. Rubin, 254 F. Supp. 190 (N.D. Ill., E.D.), which the Company relies on in its brief, pp. 15-16. In that case, the court held that a petition to enforce an administrative summons issued by the Internal Revenue Service was governed by the Federal Rules, and that the respondent was entitled to invoke the discovery machinery therein provided. The court rejected the Government's claim that Sections 7402(b) and 7604(a) of the Internal Revenue Code (see n. 10 , infra) provide a special summary procedure within the contemplation of the first proviso to Rule 81(a)(3), and the Company cites the case as being analogous to the one at bar. The Company apparently overlooks the fact that in rejecting the Government's argument, the court distinguished Goodyear Tire & Rubber Co. v. N.L.R.B., supra, on the ground that Section 11(2) of the National Labor Relations Act is substantially different from the relevant sections of the Internal Revenue Code. The court said (254 F. Supp. at 192-193):

> "While petitioner relies heavily on Goodyear Tire and Rubber Co., . . . it must be noted that said case . . . was founded upon the language in the statute there at issue calling for an 'application' rather than a 'petition,' and an 'order' rather than a 'judgment.' * * * Section 7604(a), under which this action is brought, unlike the

(Continued)

3. In any event, the deviations from the procedures prescribed in the Federal Rules were insubstantial and non-prejudicial, and they constituted a reasonable exercise of the Court's discretion under Rule 81(a)(3)

Even assuming that Section 11(2) of the Act does not establish a special procedure to secure enforcement of Board subpenas, we submit that the procedure employed in this case, while begun less formally than the Board usually begins such cases, was basically a fair proceeding which the Court authorized pursuant to its powers under the third proviso

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8/ (Continued)
statute before the Court in Goodyear, and Section 7604(b), dealing with contempt proceedings before the commissioner, speaks of 'appropriate process.' While petitioner urges that Section 7604(b) must be read in pari materia with Section 7604(a), and thus, that the latter is governed by the reasoning in Goodyear, we cannot agree. There exists a very real distinction between Section 7604(b) actions which are in the nature of contempt proceedings against persons who 'wholly made default or contumaciously refused to comply,' . . . and actions brought merely to enforce an Internal Revenue Summons. * * * By petitioner's own reasoning, a distinction between 'application' and 'appropriate process' must be drawn, and we must assume that Congress intended that its chosen words would be given meaning."

in the last sentence in Rule 81(a)(3).[9/]

This sentence, added to Rule 81(a)(3) in 1946, was not intended to alter the procedure to be followed in court enforcement of Board subpenas. It was "largely a clarifying amendment which (1) makes the Rules generally applicable to proceedings for enforcement of administrative subpenas in line with case law and (2) clearly makes appeals in such proceedings subject to the Federal Rules." 7 Moore's Federal Practice, p. 4411 (2d ed., 1966). The draftsmen of the amendment made clear by the citation of case law that the major purpose of the amendment was to settle that subpena enforcement proceedings were civil suits which resulted in final orders appealable as of right under the then newly simplified provisions of Rule 73 of the Federal Rules. See, Notes of Advisory Committee on Amendments to Rules, Rule 81, subdivision a(3) (7 Moore's Federal Practice, supra, p. 4413); Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 226-227 (C.A. 2), aff'd 317 U.S. 501;

9/ The sentence has already been set forth in full, but we will repeat it here for the sake of convenience. The sentence reads: "These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings."

Walling v. News Printing, Inc., 148 F. 2d 57 (C.A. 3), aff'd sub nomine, Oklahoma Press Co. v. Walling, 327 U.S. 186.

That the amendment was intended to preserve the summary court procedure developed for enforcement of administrative subpenas of agencies like the Board is apparent both from the wording of the Rule and the Advisory Committee note. The section of the new sentence relating to proceedings in the district court was drafted to permit flexibility in the application of the rules by providing that they applied "except as otherwise provided by statute or by rules of the district court or by order of court in the proceedings." In contrast to part (2) of the new sentence, which made the rules applicable without exception to appeals, the three exceptions in part (1) were "drawn so as to permit application of the rules in the proceedings whenever the district court deemed them helpful." Notes of the Advisory Committee on Amendments to the Rules, Rule 81(a)(3) (7 Moore's Federal Practice, supra).

The Advisory Committee, noting the danger that "the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired," cited as the case law upon which this part of the amendment rested, the Goodyear, Cudahy, Endicott Johnson, and Oklahoma Press cases discussed above. As noted, both Goodyear and Cudahy specifically reject the contention that the Federal Rules apply to Board subpena enforcement proceedings, and approve the use of a

summary proceeding initiated by the Board's application.[10]

The Advisory Committee also cited with approval Martin v. Chandis Securities Co., 128 F. 2d 731 (C.A. 9), a case upon which Harvey very heavily relies. Rather than supporting the Company's position, Chandis actually supports the Board's. There, it was held that in construing an application for enforcement of a summons issued by an Internal Revenue agent under what is now 26 U.S.C. Sec. 7604(a),[11] it

10/ In both Oklahoma Press and Endicott Johnson, the actions were also initiated by applications for orders to show cause. In Oklahoma Press, the procedure was approved without discussion by the Circuit Court. 148 F. 2d 57 (C.A. 3). In Endicott Johnson, the subpena enforcement proceeding was begun by both complaint and application for order to show cause. The district court stated that the use of an application for order to show cause would have been sufficient. 37 F. Supp. 604, 604-605 (N.D. N.Y.). The Circuit Court stated that the Federal Rules applied to the appeal, but cited Goodyear with approval for the proposition that the Federal Rules did not apply to the proceedings in the district court. 128 F. 2d 208, 227 (C.A. 2). Moreover, in Cudahy v. Holland, 315 U.S. 357, another leading case on administrative subpenas, the Supreme Court approved the use of a summary proceeding initiated by an application for order to show cause, although reversing enforcement of the subpena on other grounds.

11/ This section states: "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, (Continued)

would be treated as a "complaint" under the Federal Rules because "the Internal Revenue Code contains no provision specifying the procedure to be followed in invoking the jurisdiction of the court below" (id., at 734). The Court thereupon applied Rules 8(a) and 15(b), F.R. Civ. P., to determine whether the application stated a claim warranting the relief requested.

Contrary to the Company's claim, however, nothing in Chandis can be construed as holding that the procedural requirements of Rules 4 and 12(a), F.R. Civ. P. (dealing with issuance and service of process, and time to answer) be complied with in proceedings to enforce administrative subpenas or summonses. For, in Chandis, this Court accepted, without hint of disapproval, a district court proceeding which began with the petition for, and issuance of, an ex parte order enforcing the summons issued by the Internal Revenue agent, and which came to issue when the person summoned subsequently moved to quash the order for various reasons. See 128 F. 2d at 732, 733, affirming 33 F. Supp. 478, 479-480 (S.D. Cal.). The same procedure was used, and accepted by this Court, in the later case of Chapman v. Goodman, 219 F. 2d 802, 804-805, 806

11/ (Continued)
records or other data, the United States district court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

(C.A. 9). Accord: In re Wolrich, 84 F. Supp. 481, 482 (S.D. N.Y.); In re Albert Lindley Lee Mem. Hosp., 115 F. Supp. 643, 645 (N.D. N.Y.), aff'd 209 F. 2d 122 (C.A. 2), cert. denied sub nom., Cincotta v. U.S., 347 U.S. 960. Indeed, since, as this Court held in Chapman, the Government could initiate a subpena enforcement proceeding by means of an ex parte order which the person subpenaed could then attack by filing a motion to quash, then the procedure used in the case at bar is proper a fortiori. For here, the order enforcing the subpena was not issued ex parte, but only after the Company had been served with a copy of the application and had been given an opportunity to oppose the granting of the application, both orally and in writing.

Chapman also serves to rebut Harvey's claim that the court below never issued an order modifying the application of Rule 81(a)(3). There, as here, no order was issued which, in terms, announced that the procedures to be used in the enforcement proceeding would be modified. Rather, the district court in Chapman merely signed the ex parte order compelling the production of certain documents, and when, after service of the order, the person subpenaed filed his answer, cross-claim, motion to join indispensable parties and motion to quash the ex parte order, the district court then entertained and ruled upon the various pleadings. The district court denied the motions and struck the answer and cross-claim. On appeal, this Court construed the ex parte order enforcing the subpena as "laying aside the Rules of Civil Procedure and proceeding as to Rule 81(a)(3) under 'except as otherwise provided by statute or by rules of the district court or by order of the court in the proceeding.' (Emphasis supplied.)" (219 F. 2d at 806). So here, the action of

Chief Judge Clarke in setting the Board's application for hearing on October 24, and there giving the Company 10 days in which to file a written response to the application with the warning that the case would then be taken as submitted, constituted an "order of the court in the proceeding" modifying the application of the Federal Rules to the case. That the Company elected to rest its defense on the sole ground that it had not been served with process and had not been given 20 days in which to respond, does not militate against the propriety of the procedure the District Court followed, or the validity of the order resulting therefrom.

Equally unavailing is the Company's reliance on United States v. Powell, 379 U.S. 48, another case arising under 26 U.S.C. Sec. 7604(a). There, the Court held that a showing of probable cause to believe the taxpayer had committed fraud was not a prerequisite to enforcement by a district court of a summons issued by the Internal Revenue Service. The Court explained that the substantive standards for judicial enforcement of an administrative summons under the applicable provision of the Internal Revenue Code are analogous to the "requirements in like circumstances involving other agencies" (id., at 57, citing Oklahoma Press v. Walling, supra). The Court went on to say, however, that the limited scope of litigable issues in the enforcement proceeding "does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered" (id., at 58). While going on to set forth some of the defenses a taxpayer could raise, the Court appended the following footnote:

"Because §7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, Martin v. Chandis Securities Co., 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under §7604(b) might be made simultaneously with the filing of the complaint."

This dictum does not mean, as the Company claims, that there must be compliance with all the terms of the Federal Rules, including the issuance and service of process, and the requirement that the party subpenaed have 20 days in which to answer the request for enforcement. Rather, the Court was trying to make clear the fact that a taxpayer would have an opportunity to be heard and to raise any cognizable defenses before he could be compelled to comply with the summons. The foregoing interpretation is confirmed by the Court's reference to Martin v. Chandis Securities, discussed supra--a case which, we have shown, is concerned with procedural fairness, not procedural technicalities. See also, McGarry's, Inc. v. Rose, 344 F. 2d 416 (C.A. 1). There, a district court enforced five Internal Revenue summonses in a proceeding begun by the filing of petitions to enforce and the issuance of orders to show cause. On appeal, the persons summoned challenged the procedure used as not

being in conformity with the Federal Rules, as required by Powell. The First Circuit rejected the claim, saying (344 F. 2d at 418):

> "A reading of the opinion in United States v. Powell, supra, leaves no doubt that the thrust thereof is to insure that a taxpayer obtain an adversary-type hearing in the district court prior to his being forced to comply with an administrative summons which he challenges in good faith. That the procedure followed in the instant case fully complies with the essential requirements of the Powell decision appears so clearly from the record herein as to preclude any need for further discussion of appellants' contentions with reference thereto."

Other courts have also reached the conclusion that Rule 81(a)(3), as amended, does not require that administrative subpena enforcement proceedings be initiated by the time-consuming process of complaint, issuance and service of process, and answer. In approving the use of an order to show cause to commence such a proceeding under Section 29 of the Shipping Act (46 U.S.C. 828)--a section similar to Section 11(2) of the NLRA--the courts have emphasized that it would unduly frustrate and delay the proceedings to require "the lengthy complaint and answer procedure." Federal Maritime Commission v. Transoceanic Terminal, 252 F. Supp. 743, 745-746 (N.D. Ill.). See also, Federal Maritime Commission v. New York Terminal Conference, 262 F. Supp. 225, 230 (S.D. N.Y.), aff'd 373 F. 2d 424 (C.A. 2); Federal Maritime Commission v. DeSmedt, 366 F. 2d 464, 466

(C.A. 2), cert. denied, 385 U.S. 974. Under a provision of the Federal Trade Commission Act virtually identical to the one at bar (15 U.S.C. 49), the same reasoning has also led to a holding that the substantial delay involved in a full plenary hearing militates against the conclusion that Congress intended to require adherence to all the procedural requirements of the Federal Rules. United States v. Associated Merchandising Corp., 256 F. Supp. 318 (S.D. N.Y.); Federal Trade Commission v. Green, 252 F. Supp. 153 (S.D. N.Y.).

Finally, even in those cases cited by the Company in which the court stated that Rule 81(a)(3) required the agency in question to comply with the Federal Rules, it is clear that the court did not consider this to mean that the proceedings must be initiated as an ordinary civil suit is begun. Thus, in Shasta Minerals & Chemicals v. S.E.C., 328 F. 2d 285 (C.A. 10), the court specifically approved the district court's use of Rule 81(a)(3) as allowing commencement of a subpena enforcement proceeding by an order to show cause, followed by summary judgment under the Federal Rules. Similarly, in Long Beach Federal Savings and Loan Association v. Home Loan Bank Board, 189 F. Supp. 589, 596 (S.D. Cal.), though stating that the Federal Rules were to apply through Rule 81(a)(3) to subpena enforcement proceedings, the court again approved the use of an order to show cause to commence the proceeding. Indeed, appellant's citation of these cases exposes the basic weakness of its position before this Court. For, contrary to the Company's claim, the Board does not take the position that the Company had no right to present defenses to the District Court. Rather, the Board contends that Harvey Aluminum was afforded

precisely that opportunity, as required by the cases, and that appellant simply refused to present any evidence in support of its refusal to comply. Accordingly, the subpena was properly enforced.

CONCLUSION

For the reasons stated, it is respectfully requested that the appeal should be denied, and that the court's order be affirmed.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

SOLOMON I. HIRSH,
CHARLES N. STEELE,
Attorneys,

National Labor Relations Board.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.